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**REESE RICHMAN LLP**

Michael R. Reese (Cal. State Bar. No. 206773)

Kim E. Richman

Belinda L. Williams

875 Avenue of the Americas, 18<sup>th</sup> Floor

New York, New York 10001

Telephone: (212) 643-0500

Facsimile: (212) 253-4272

michael@reaserichman.com

kim@reaserichman.com

belinda@reaserichman.com

*Counsel for Plaintiff and the Proposed Class*

**KIRKLAND & ELLIS LLP**

Jeffrey L. Willian

Robert B. Ellis

Bradley H. Weidenhammer

Nickolas Kacprowski (Cal. State Bar No. 242684)

300 North La Salle

Chicago, Illinois 60654

Telephone: (312) 862-2000

Facsimile: (312) 862-2200

*Counsel for Defendant*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

WAYNE KOH, Individually And On Behalf Of  
All Others Similarly Situated,

Plaintiff,

vs.

SC Johnson & Son, Inc.,

Defendant.

Case No. 09-cv-00927 (RMW)

~~PROPOSED~~ STIPULATED  
PROTECTIVE ORDER NO. 1

**AS AMENDED BY THE COURT**

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of  
 3 confidential, proprietary, or private information for which special protection from public  
 4 disclosure and from use for any purpose other than prosecuting this litigation would be  
 5 warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the  
 6 following Stipulated Protective Order. The parties acknowledge that this Order does not confer  
 7 blanket protections on all disclosures or responses to discovery and that the protection it affords  
 8 extends only to the information or items that are entitled under the applicable legal principles to  
 9 treatment as confidential. The parties further acknowledge, as set forth in Section 10 below, that  
 10 this Stipulated Protective Order creates no entitlement to file confidential information under seal;  
 11 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards  
 12 that will be applied when a party seeks permission from the court to file material under seal.

13 2. DEFINITIONS

14 2.1 Party: any party to this action, including all of its officers, directors,  
 15 employees, consultants, retained experts, and outside counsel (and their support staff).

16 2.2 Disclosure or Discovery Material: all items or information, regardless of the  
 17 medium or manner generated, stored, or maintained (including, among other things,  
 18 testimony, transcripts, or tangible things) that are produced or generated in disclosures or  
 19 responses to discovery in this matter.

20 2.3 "CONFIDENTIAL" Information or Items: information (regardless of how  
 21 generated, stored or maintained) or tangible things that qualify for protection under  
 22 standards developed under F.R.Civ.P.26(c).

23 2.4 "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" Information or  
 24 Items: extremely sensitive "Confidential Information or Items" whose disclosure to  
 25 another Party or nonparty would create a substantial risk of serious injury that could not  
 26 be avoided by less restrictive means, including trade secrets, confidential research and  
 27

development, or proprietary business information, the disclosure of which might competitively disadvantage the Producing Party.

2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery Material in this action.

2.7. Designating Party: a Party or non-party that designates information or items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY."

2.8 Protected Material: any Disclosure or Discovery Material that is designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY."

2.9. Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.

2.10 House Counsel: attorneys who are employees of a Party.

2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staffs).

2.12 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action, and who is not a past or a current employee of a Party or of a competitor of a Party, and who, at the time of retention, is not anticipated to become an employee of a Party or competitor of a Party. This definition includes a professional jury or trial consultant retained in connection with this litigation.

2.13 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

1 3. SCOPE

2 The protections conferred by this Stipulation and Order cover not only Protected  
3 Material (as defined above), but also any information copied or extracted therefrom, as  
4 well as all copies, excerpts, summaries, or compilations thereof, plus testimony,  
5 conversations, or presentations by parties or counsel to or in court or in other settings that  
6 might reveal Protected Material.

7 4. DURATION

8 Even after the termination of this litigation, the confidentiality obligations  
9 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in  
10 writing or a court order otherwise directs.

11 5. DESIGNATING PROTECTED MATERIAL

12 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each  
13 Party or non-party that designates information or items for protection under this Order  
14 must, to the extent feasible, take care to limit any such designation to specific material  
15 that qualifies under the appropriate standards. ~~Notwithstanding the above, a Designating~~  
16 ~~Party may designate a document in its entirety as Protected Material even though only~~  
17 ~~portions of the document may qualify.~~ **A Designating Party must take care to designate**  
18 **for protection only those parts of material, documents, items, or oral or written**  
19 **communications that qualify, so that other portions of the material, documents, items, or**  
20 **communications for which protection is not warranted are not swept unjustifiably within**  
21 **the ambit of this Order.** If it comes to a Designating Party's attention that information or items  
22 that it designated for protection do not qualify for protection at all, or do not qualify for the level  
23 of protection initially asserted, that Designating Party must, within a reasonable time, notify all  
24 other parties that it is withdrawing the mistaken designation.

25 5.2 Manner and Timing of Designations. Except as otherwise provided in this  
26 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or  
27 ordered, material that qualifies for protection under this Order must be clearly so  
28 designated before the material is disclosed or produced. Designation in conformity with  
this Order requires:

(a) for information in documentary form (apart from transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" on each page that contains protected material. **If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion, the level of protection being asserted.**

A Party or non-party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, **or portions thereof**, qualify for protection under this Order, then, before producing copies of the specified documents, the Producing Party must affix to the copies the appropriate legend ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY") on each page that contains Protected Material. **If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portions and must specify, for each portion, the level of protection being asserted.**

(b) for testimony given in deposition or in other pretrial or trial proceedings, that the Party or non-party offering or sponsoring the testimony shall invoke on the record (before the deposition or proceeding is concluded) a right to have up to 14 days after receipt of the transcript to identify the specific portions of the testimony as to which protection is sought and to specify the level of protection being asserted ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY"). Until the expiration of the 14 days after receipt of the transcript or upon the designation or notice that no designation will be made, whichever comes first, the testimony shall be maintained as "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY." Only those portions of the testimony that are appropriately designated for protection within the 14 days shall be covered by the provisions of this Stipulated Protective Order.

Transcript pages containing Protected Material must be separately bound by the court reporter, who must affix to the top of each such page the legend

"CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY," as instructed by the Party or nonparty offering or sponsoring the witness or presenting the testimony.

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY." If only portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portions, specifying whether they qualify as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY."

5.3 Inadvertent Failures to Designate. An inadvertent failure to designate qualified information or items as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. If material is appropriately designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" after the material was initially produced, the Receiving Party, on notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

## 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. A challenge to a Designating Party's confidentiality designation must be asserted within a reasonable time after the original designation is disclosed.

6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating Party's confidentiality designation must do so in good faith and must begin the process by conferring directly (**in voice-to-voice dialogue; other forms of communication are not sufficient**) with counsel for the Designating Party. In conferring, the challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated

1 material, to reconsider the circumstances, and, if no change in designation is offered, to  
 2 explain the basis for the chosen designation. A challenging Party may proceed to the next  
 3 stage of the challenge process only if it has engaged in this meet and confer process first.

4       6.3 Judicial Intervention. A Party that elects to press a challenge to a  
 5 confidentiality designation after considering the justification offered by the Designating  
 6 Party may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil  
 7 Local Rule 79-5, if applicable) that identifies the challenged material and sets forth in  
 8 detail the basis for the challenge. Each such motion must be accompanied by a competent  
 9 declaration that affirms that the movant has complied with the meet and confer  
 10 requirements imposed in the preceding paragraph.

11       The burden of persuasion in any such challenge proceeding shall be on the  
 12 Designating Party. Until the Court rules on the challenge, all parties shall continue to  
 13 afford the material in question the level of protection to which it is entitled under the  
 14 Producing Party's designation.

## 15 7. ACCESS TO AND USE OF PROTECTED MATERIAL

16       7.1 Basic Principles. A Receiving Party may use Protected Material that is  
 17 disclosed or produced by another Party or by a non-party in connection with this case  
 18 only for prosecuting, defending, or attempting to settle this litigation. Such Protected  
 19 Material may be disclosed only to the categories of persons and under the conditions  
 20 described in this Order. When the litigation has been terminated, a Receiving Party must  
 21 comply with the provisions of section 11, below (FINAL DISPOSITION).

22       Protected Material must be stored and maintained by a Receiving Party at a  
 23 location and in a secure manner that ensures that access is limited to the persons  
 24 authorized under this Order.

25       7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise  
 26 ordered by the court or permitted in writing by the Designating Party, a Receiving Party  
 27 may disclose any information or item designated CONFIDENTIAL only to:

1 (a) the parties to this action;

2 (b) the Receiving Party's Outside Counsel of record in this action, including  
3 employees of said Counsel to whom it is reasonably necessary to disclose the information  
4 for this litigation;

5 (c) the officers, directors, and employees (including House Counsel) of the  
6 Receiving Party to whom disclosure is reasonably necessary for this litigation;

7 (d) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
8 reasonably necessary for this litigation and who have signed the "Agreement to Be Bound  
9 by Protective Order" (Exhibit A);

10 (e) the Court and its personnel;

11 (f) stenographers, their staffs, and professional vendors to whom disclosure is  
12 reasonably necessary for this litigation and who have signed the "Agreement to Be Bound  
13 by Protective Order" (Exhibit A);

14 (g) witnesses in the action to whom disclosure is reasonably necessary after  
15 having been advised of the existence and terms of this Order and having signed the  
16 "Agreement to Be Bound By Protective Order" (Exhibit A);

17 (h) the author of the document or the original source of the information.

18 7.3 Disclosure of "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY"  
19 Information or Items. Unless otherwise ordered by the court or permitted in writing by  
20 the Designating Party, a Receiving Party may disclose any information or item  
21 designated "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" only to:

22 (a) the parties to this action;

23 (b) the Receiving Party's Outside Counsel of record in this action, including  
24 employees of said Counsel to whom it is reasonably necessary to disclose the information  
25 for this litigation;

26

27



(c) House Counsel of a Receiving Party (1) who has no involvement in competitive decision-making involving the subject matter of this action, and (2) to whom disclosure is reasonably necessary for this litigation;

(d) Experts (as defined in this Order) to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(e) the Court and its personnel;

(f) stenographers, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(g) after obtaining the Disclosing Party's permission, which it will not withhold unreasonably, witnesses in the action to whom disclosure is reasonably necessary after having been advised of the existence and terms of this Order and having signed the "Agreement to Be Bound By Protective Order" (Exhibit A); and

(h) the author of the document or the original source of the information.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION.

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY," the Receiving Party must so notify the Designating Party, in writing (by fax or email, if possible) no more than seven court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The Receiving Party also must inform in writing the Party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving

1 Party must deliver a copy of this Stipulated Protective Order promptly to the Party in the  
2 other action that caused the subpoena or order to issue.

3 The purpose of imposing these duties is to alert the interested parties to the  
4 existence of this Protective Order and to afford the Designating Party in this case an  
5 opportunity to try to protect its confidentiality interests in the court from which the  
6 subpoena or order issued. The Designating Party shall bear the burdens and the expenses  
7 of seeking protection in that court of its confidential material - and nothing in these  
8 provisions should be construed as authorizing or encouraging a Receiving Party in this  
9 action to disobey a lawful directive from another court.

#### 10 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

11 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed  
12 Protected Material to any person or in any circumstance not authorized under this  
13 Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing  
14 the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve  
15 all copies of the Protected Material, (c) inform the person or persons to whom  
16 unauthorized disclosures were made of all the terms of this Order, and (d) request such  
17 person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is  
18 attached hereto as Exhibit A.

#### 19 10. FILING PROTECTED MATERIAL

20 Without written permission from the Designating Party or a court order secured  
21 after appropriate notice to all interested persons, a Party may not file in the public record  
22 in this action any Protected Material. A Party that seeks to file under seal any Protected  
23 Material must comply with Civil Local Rule 79-5.

24 Where filings are made under seal, the Party filing the document shall lodge with  
25 the Court's chambers an unredacted version of the filing.

26 Any Protected Material used openly in court hearings or trial will not be kept  
27 confidential absent order of the Court, secured in advance of the use of such material.

1 11. FINAL DISPOSITION

2 Unless otherwise ordered or agreed in writing by the Producing Party, within  
 3 sixty days after the final termination of this action, each Receiving Party must undertake  
 4 its best efforts to locate and return all Protected Material to the Producing Party. The  
 5 “final termination” shall occur when the time for appeal or review of a final judgment  
 6 expires or, if any appeal is filed and not dismissed, five (5) business days after the final  
 7 judgment is upheld on appeal in all material respects and is no longer subject to review  
 8 upon appeal or by writ of certiorari. As used in this subdivision, "all Protected Material"  
 9 includes all copies, abstracts, compilations, summaries or any other form of reproducing  
 10 or capturing any of the Protected Material. With permission in writing from the  
 11 Designating Party, the Receiving Party may destroy some or all of the Protected Material  
 12 instead of returning it.

13 Whether the Protected Material is returned or destroyed, the Receiving Party must  
 14 submit a written certification to the Producing Party (and, if not the same person or  
 15 entity, to the Designating Party) by the sixty-day deadline that identifies (by category,  
 16 where appropriate) all the Protected Material that was returned or destroyed and that  
 17 affirms that the Receiving Party has not knowingly retained any copies, abstracts,  
 18 compilations, summaries or other forms of reproducing or capturing any of the Protected  
 19 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy  
 20 of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney  
 21 work product, even if such materials contain Protected Material. Any such archival  
 22 copies that contain or constitute Protected Material remain subject to this Protective  
 23 Order as set forth in Section 4 (DURATION), above.

24 12. MISCELLANEOUS

25 12.1 Right to Further Relief. Nothing in this Order abridges the right of any  
 26 person to seek its modification by the Court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

12.3 Injunctive Relief. The Parties agree that disclosure of Protected Materials in violation of this Order cannot be remedied through monetary relief alone, and that injunctive relief is appropriate to prevent any threatened disclosure.

12.4 Jurisdiction. The Court shall retain jurisdiction over any disputes arising from this Order **for a period of six months after final termination of this action.**

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

DATED: December 3, 2009

**KIRKLAND & ELLIS LLP**

/s/ Bradley H. Weidenhammer

Bradley H. Weidenhammer

300 North La Salle

Chicago, Illinois 60654

Telephone: (312) 862-2000

Facsimile: (312) 862-2200

*Counsel for Defendant SC Johnson & Son, Inc.*

DATED: December 3, 2009

**REESE RICHMAN LLP**

/s/ Michael R. Reese

Michael R. Reese

875 Avenue of the Americas, 18th Floor

New York, New York 10001

Telephone: (212) 643-0500

Facsimile: (212) 253-4272

*Counsel for Plaintiff and the Proposed Class*

~~PROPOSED~~ ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: December 3, 2009

Howard R. Loyd

**United States Magistrate Judge**

## EXHIBIT A

## ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, \_\_\_\_\_ [print or type full name], of  
 \_\_\_\_\_ [print or type full address], declare under penalty  
 of perjury that I have read in its entirety and understand the Stipulated Protective Order  
 that was issued by the United States District Court for the Northern District of California  
 on \_\_\_\_\_ in the case of *Koh v. SC Johnson & Son, Inc.*, Case no. 09-cv-00927 (RMW)  
 (N. D. Cal.). I agree to comply with and to be bound by all the terms of this Stipulated  
 Protective Order and I understand and acknowledge that failure to so comply could  
 expose me to sanctions and punishment in the nature of contempt. I solemnly promise  
 that I will not disclose in any manner any information or item that is subject to this  
 Stipulated Protective Order to any person or entity except in strict compliance with the  
 provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for  
 the Northern District of California for the purpose of enforcing the terms of this  
 Stipulated Protective Order, even if such enforcement proceedings occur after  
 termination of this action.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_